

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

WILDEARTH GUARDIANS,	)	
	)	
Plaintiff,	)	No. _____
	)	
v.	)	
	)	
KEN SALAZAR, Secretary of Interior, sued in his official capacity	)	<b>COMPLAINT</b>
	)	<b>FOR DECLARATORY AND</b>
	)	<b>INJUNCTIVE RELIEF</b>
Defendant.	)	
_____	)	

**INTRODUCTION**

1. Plaintiff, WildEarth Guardians (“Guardians”), brings this action against Defendant, Ken Salazar, U.S. Secretary of the Interior (“the Secretary”), in his official capacity, to force him to carry out his duties under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq. The Secretary has failed to comply with his mandatory duty under the ESA to make the required finding on Guardians’ petition to list the White-Sided Jackrabbit (*Lepus callotis*) (“Jackrabbit”) as an endangered or threatened species and to designate its critical habitat. This lawsuit seeks to force the Secretary to make the overdue finding on Guardians’ petition.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision).

3. This Court has authority to grant Guardians’ requested relief pursuant to 28 U.S.C. §§ 2201-02 (declaratory and injunctive relief).

4. More than 60 days ago, Guardians furnished the Secretary with written notice of

his violations of the ESA and of Guardians' intent to sue. See 16 U.S.C. § 1540(g)(2).

5. Because the Secretary has not remedied his violations of the ESA by making the overdue finding on Guardians' petition, an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. See 28 U.S.C. § 2201.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A). The Jackrabbit is found in this judicial district. Both Guardians and the Secretary maintain major offices in this district.

### **PARTIES**

7. Plaintiff WILDEARTH GUARDIANS sues on behalf of itself and its adversely affected members. WildEarth Guardians is a non-profit environmental organization based in Santa Fe, New Mexico. Guardians' mission is to protect and restore wildlife, wild places, and wild rivers in the American Southwest. It has over 4,500 members, most of whom reside in New Mexico. WildEarth Guardians has an active endangered species protection campaign. As part of this campaign, Guardians has repeatedly urged the Secretary to list imperiled species, including the Jackrabbit, as threatened or endangered species pursuant to the ESA. Guardians filed its petition to list the Jackrabbit in October 2008. Guardians invested substantial organizational resources in preparing the petition and in pursuing prior litigation to force the Secretary to respond to the petition. Guardians' members and staff frequently use and enjoy, and will continue to use and enjoy, the Jackrabbit and its habitat for plant and wildlife viewing and for recreational, aesthetic, and scientific activities. Guardians and its members are particularly concerned with the conservation of the Jackrabbit and the ecosystem on which it depends for its survival. Guardians and its members have a substantial interest in this matter and are adversely affected by the Secretary's failure to comply with the ESA. The requested relief will redress the

injuries of Guardians and its members.

8. Defendant, KEN SALAZAR, is the Secretary of the United States Department of the Interior. As such, he has ultimate responsibility for implementation of the ESA. He is sued in his official capacity. In this case, the Secretary has delegated his responsibilities under the ESA to the United States Fish and Wildlife Service (“FWS”), an agency within the United States Department of the Interior.

### **LEGAL BACKGROUND**

9. Congress passed the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....” 16 U.S.C. 1531(b).

10. To this end, the ESA requires the Secretary to list species of plants and animals that are facing extinction as “threatened” or “endangered” and to designate protected “critical habitat” for each listed threatened or endangered species. 16 U.S.C. § 1533(a). An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range....” 16 U.S.C. § 1532(6). A “threatened species” is a species “which is likely to become an endangered species within the foreseeable future....” 16 U.S.C. § 1532(20).

11. In order for the ESA to protect a species, the Secretary must first officially list the species as either threatened or endangered. 16 U.S.C. § 1533. The listing process is the critical first step in the ESA’s system of species protection and recovery. The Secretary must also designate the species’ habitat as “critical habitat” in order for the habitat to receive ESA protections.

12. Any interested person can initiate the listing process by filing a petition to list a

species with the Secretary. See 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

13. Upon receipt of a petition to list a species, the Secretary is required to make an initial finding known as a “90-day finding.” Specifically, “to the maximum extent practicable,” within 90 days, the Secretary must determine whether the petition presents “substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). The ESA’s implementing regulations define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b).

14. If the Secretary finds that the petition presents substantial information, he “shall promptly commence a review of the status of the species concerned,” and must publish the finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

15. If the Secretary makes a positive 90-day finding, he has 12 months from the date that the petition was received to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals to list species of higher priority, provided that the Secretary is making expeditious progress on listing actions. See 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This is known as the 12-month finding.

16. If the Secretary makes a 12-month finding that the petitioned action is warranted, he must then publish in the Federal Register a proposed rule to list the species as endangered or threatened. 16 U.S.C. § 1533(b)(5). Within one year of this publication, the Secretary is required to render a determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). At such time, the Secretary must either list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit

more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) and (b)(6)(B)(i).

17. “Concurrently” with listing a species as threatened or endangered, the Secretary must designate critical habitat for the species “to the maximum extent prudent and determinable.” 16 U.S.C. §§ 1533(a)(3)(A) and (b)(6)(C).

18. Designation of critical habitat for listed species provides additional necessary protection and aids in the conservation of the species because all federal agencies must consult with the FWS to “insure that an action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [its critical habitat].” 16 U.S.C. § 1536(a)(2).

#### **FACTUAL BACKGROUND**

19. The White-Sided Jackrabbit (*Lepus callotis*) (“Jackrabbit”) is light, grizzled brown on the upperparts, becoming darker on the nape and back. The flanks and underparts are white, and it has a conspicuous white side, with the flanks variously overlain with brown. The tail is black above and white



below. The eyes are light brown to golden-yellow. The Jackrabbit is pictured here.<sup>1</sup>

20. The Jackrabbit is found in an extremely restricted area of New Mexico, where it is known only from within 20 miles of the international border with Mexico in southern Hidalgo County. The Jackrabbit’s historical distribution in Hidalgo County consisted of 46.3 square miles in the southern portions of the Animas and Playas Valleys. Current surveys indicate that

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<sup>1</sup> Photo: © Cesar Mendez.

the population in the Playas Valley is extirpated. Populations in the Animas Valley have declined dramatically since the first comprehensive surveys conducted in 1976.

21. The primary threat to the Jackrabbit is habitat loss due to grazing on grassland and the resulting shrub encroachment that supports competing species. The Jackrabbit requires pure stands of grass at high elevations for both forage and protection from predators. Currently, there are few remaining large patches of intact semi-desert grassland where the Jackrabbit can thrive. Climate change can also impact grassland health by facilitating shrub encroachment and thereby poses an additional threat to this species.

22. On October 9, 2008, Guardians filed a petition requesting that the Secretary list the Jackrabbit as a threatened or endangered species under the ESA throughout its range. The Secretary received Guardians' petition on October 15, 2008.

23. On April 3, 2009, Guardians filed suit in the District Court of New Mexico over the failure of the Secretary to issue a timely 90-day finding for the Jackrabbit (WildEarth Guardians v. Salazar, No. 6:09-cv-00331-MCA-RLP). On August 6, 2009, Guardians and the Secretary reached a settlement agreement requiring the Secretary to issue a 90-day finding for the Jackrabbit on or before July 19, 2009.

24. On July 22, 2009, the Secretary issued a positive 90-day finding on Guardians' petition. 74 Fed. Reg. 36152-36158. The Secretary concluded that the petition presented substantial scientific information that Guardians' request to list the Jackrabbit as a threatened or endangered species might be warranted. The Secretary found that multiple threats may be imperiling the Jackrabbit, including: shrub encroachment into its grassland habitat, fostered by current and historic livestock grazing, drought, and fire exclusion; hunting; and inadequate regulatory protections. Id.

25. Because the Secretary rendered a positive 90-day finding, he was then obligated to proceed to the second step in the ESA listing process, completing a 12-month finding. A 12-month finding must be completed within 12-months of the receipt of a petition.

26. On October 23, 2009, Guardians provided the Secretary with written 60-day notice of its intent to sue over the Secretary's failure to make a 12-month finding on the petition to list the Jackrabbit. At that time, more than 12 months had passed since Guardians submitted its petition. The Secretary received Guardians' notice of intent to sue on November 6, 2009. On December 24, 2009, the Secretary acknowledged receipt of Guardians' 60-day notice. The Secretary did not provide a date for a 12-month finding on the Jackrabbit.

27. To date, the Secretary has not made the required 12-month finding on Guardians' petition to list the Jackrabbit.

#### **CLAIM FOR RELIEF**

28. Each and every allegation set forth in this Complaint is incorporated herein by reference.

29. The Secretary has failed to make a mandatory 12-month finding concerning Guardians' petition to list the Jackrabbit within 12 months of receiving Guardians' petition and has failed to publish such finding in the Federal Register.

30. By failing to render a 12-month finding on Guardians' petition within 12 months of receipt, the Secretary has failed to perform a mandatory act or duty pursuant to the ESA. See 16 U.S.C. § 1533(b)(3)(B).

#### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff WildEarth Guardians requests that this Court enter judgment providing the following relief:

- A. A declaration that the Secretary has violated the ESA by failing to make the 12-month finding on Guardians' petition to list the Jackrabbit;
- B. An injunction compelling the Secretary to make the 12-month finding on Guardians' petition to list the Jackrabbit and to publish such finding in the Federal Register by a reasonable date certain;
- C. An order awarding Guardians its costs of litigation, including reasonable attorney's fees, as authorized by the ESA citizen suit provision, 16 U.S.C. § 1540(g); and
- D. Such other and further relief as the Court deems just and proper.

Respectfully submitted this 1st day of February 2010.

/s/ Samantha Ruscavage-Barz  
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